(2)

No. 90-1096

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROSALIND MERRIWEATHER,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER FAILS TO DEMONSTRATE "SPECIAL AND IMPORTANT REASONS" FOR WHICH THIS COURT SHOULD GRANT HER PETITION FOR WRIT OF CERTIORARI?

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S RACE DISCRIMINATION CLAIM?

III. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO AMEND HER COMPLAINT TO ADD A BREACH OF IMPLIED EMPLOYMENT AGREEMENT CLAIM IN *MERRIWEATHER I*?

IV. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S BREACH OF IMPLIED EMPLOYMENT AGREEMENT CLAIM IN *MERRIWEATHER II*?

V. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES?

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APPLICABLE STATUTORY PROVISION

At issue is Section 202 of the Michigan Elliott-Larsen Civil Rights Act, M.C.L.A. 37.2202, the text of which appears on page 18 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This action arises from an employment dispute between Petitioner and her former employer, International Business Machines Corporation ("IBM"). Petitioner alleges that IBM discharged her from its employ on account of her race and in breach of an implied employment agreement to discharge only for just cause. The substantive issues involved in this action concern state law exclusively. There are no federal claims.

A. Petitioner's Employment History With IBM

Petitioner began her employment at IBM in November, 1976. She was trained in accordance with a structured program provided by IBM to all of its new marketing representatives, and thereafter, was assigned a quota and territory.

Petitioner was a satisfactory performer until 1981, when she experienced a number of personal problems that permanently affected her performance. Petitioner's only child died that year, and she and her husband were divorced. Petitioner admits that after the occurrence of these events, she simply could not perform for IBM as she had before.

From 1981 through 1984, Petitioner's performance declined. In her Petition, Petitioner blames her performance problems on "significant difficulties in her relationship with her superiors." However, there is no evidence in the record suggesting that Petitioner's relationships with her supervisors were at fault.

Petitioner went on fully paid sick leave because of emotional problems in October 1984. When she returned from sick leave in January 1985, IBM placed her into a retraining program. In June

1985, just before being placed back on sales quota, Petitioner again went on fully paid sick leave due to emotional difficulties.

Petitioner returned to work in April 1986. IBM placed her in its Detroit Renaissance Center branch office under the direction of Marketing Manager Jeff Ray. Petitioner was placed in the position of "overlay software marketing representative." In that position, she was expected to "sell" software to marketing representatives and directly to customers, to keep the representatives informed of new technologies, and to help them in the marketing effort by providing additional expertise. From April to September 1986, Petitioner attended training classes concerning IBM's software products and marketing techniques. Thereafter, Petitioner was given a performance plan which described her responsibilities and was placed on quota.

While Petitioner was assigned a sales quota, she did not bear the full pressure of a quota assignment. An overlay marketing representative achieves her quota in part by "riding" on the quota of the entire branch; that is, she receives credit for every piece of software sold by the other marketing representatives.

Although Petitioner performed satisfactorily in September, she did not meet the requirements of her plan from October to December 1986. She did not forecast business opportunities accurately, nor was she instrumental in selling software. Despite her extensive training period and her long years of selling experience, other branch employees complained that Petitioner had nothing to contribute.

In December 1986, Ray completed an informal appraisal of Petitioner's performance. He informed her that unless she quickly improved, he would have to rate her "unsatisfactory" on her next formal evaluation. If this occurred, Petitioner would be placed on a 90-day "improvement plan." Ray advised Petitioner as to how she could improve her performance.

Despite Ray's discussion with Petitioner, her performance did not improve. On April 2, 1987, she received a formal

performance evaluation from Ray rating her as "unsatisfactory." The review stated:

> Roz is a positive and eager member of the branch. Her efforts must, however, be weighed against her results and contribution. She has not met her marketing objectives. She has not been an active participant and contributor to a win and was not at all involved in a key loss. She does not understand the realistic opportunity in the office and is not conversant with current marketing situations. She has not maintained a working plan on her accounts. She has not developed an Executive Education Plan. Her peer credibility continues to suffer based on lack of product knowledge and effective use of their time. She must improve in her use of resources. Her leadership has not been demonstrated in a successful marketing effort. She is respected for her positive "Can do" attitude and sincere desire for improvement, but is not meeting the requirements of the job.

B. The Discharge

Petitioner was placed on an improvement plan on May 22, 1987. The plan required that Petitioner identify five top marketing opportunities, develop effective marketing strategies, and close business by August 31, 1987. The plan further required that she submit accurate monthly forecasts. Ray informed Petitioner that unless she succeeded, her employment would be terminated.

While Petitioner technically met her quota during the improvement plan period, she did so only through the sales efforts of the marketing representatives in the branch. She did not make or contribute to any of the sales made during the period, nor did she make *any* progress toward achieving her improvement plan goals. On September 4, 1988, as a result of her consistently unsatisfactory performance, Petitioner's employment was terminated. Upon her termination, IBM paid Petitioner twenty-two weeks salary as severance pay. Shortly after her discharge, Petitioner filed a workers' compensation claim, which IBM settled with payment to Petitioner of $80,000.

C. "Merriweather I"

Petitioner filed suit against IBM in state court on May 10, 1988, alleging, *inter alia*, that IBM had discharged her from its employ on the basis of race ("Merriweather I"). IBM removed the case to the United States District Court for the Eastern District of Michigan on the basis of diversity.

On July 26, 1988, the District Court conducted a scheduling conference, setting a discovery cut-off date of January 25, 1989 and a dispositive motion cut-off date of February 15, 1989. During the scheduling conference, the parties explicitly agreed that no additional claims would be added. Shortly thereafter, Petitioner served her Fourth Set of Interrogatories on IBM, seeking, *inter alia*, information relative to other IBM employees who had submitted race discrimination complaints to IBM. IBM objected to producing this information, and the District Court upheld the objection.

On February 15, 1989, IBM filed its Motion for Summary Judgment. On the same date, Petitioner filed a Motion for Leave to File her First Amended Complaint, seeking to add a claim alleging breach of an implied employment agreement. The District Court denied Petitioner's motion on the grounds of undue delay prejudicial to IBM and because Petitioner's motion was in explicit contradiction of her prior agreement *not* to amend her Complaint. On May 10, 1989, the District Court granted IBM's Motion for Summary Judgment.

D. "Merriweather II"

On April 20, 1989, Petitioner filed a second lawsuit in state court against IBM, joining Petitioner's former supervisors as individual defendants ("Merriweather II"). The lawsuit alleged, *inter alia*, that IBM had wrongfully discharged Petitioner in breach of an implied employment agreement.

The action was removed to the United States District Court for the Eastern District of Michigan on the basis of diversity. Petitioner filed a Motion to Remand, but the District Court

retained jurisdiction, holding that the individual defendants had been fraudulently joined for purposes of defeating diversity. On February 12, 1990, the District Court granted Respondents' Motion for Summary Judgment, holding that Petitioner's breach of contract claim was barred by the doctrine of collateral estoppel.

Petitioner appealed the district court's decisions in both *Merriweather I* and *Merriweather II* to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit affirmed both decisions.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because Petitioner has failed to show, or even to assert, that there are "special and important" reasons justifying the attention of this Court. Sup. Ct. R. 10.1. Petitioner has failed to allege any conflict between the Sixth Circuit's decision and the decisions of other circuits, the Michigan Supreme Court, or this Court. Moreover, Petitioner has failed to assert a departure from the usual course of judicial proceedings or an improperly decided federal question. Instead, Petitioner presents a case involving purely state law concerns. This Court does not properly function as a second court of appeal, especially where only state law substantive issues are involved. Therefore, this Petition should not be granted.

Petitioner cannot establish that her claims have merit, in any case. With regard to her race discrimination claim, Petitioner cannot establish that she was treated differently than white IBM representatives, or even that she was treated unfairly. The Sixth Circuit properly affirmed the District Court's dismissal of this claim.

The Sixth Circuit also properly affirmed the District Court's denial of Petitioner's Motion to Amend her Complaint in *Merriweather I*. Petitioner failed to bring her Motion until after the close of discovery and until the day IBM filed its Motion for Summary Judgment. Moreover, Petitioner had agreed seven months earlier that she would not seek any amendments to the

pleadings. Clearly, the District Court did not abuse its discretion by denying Petitioner's Motion.

The Sixth Circuit properly affirmed the denial of Petitioner's breach of contract claim in *Merriweather II*, as well. The District Court correctly determined that this claim was barred by the doctrine of collateral estoppel, as the *Merriweather I* court had found that Petitioner had been discharged because of unsatisfactory work performance.

Even if the District Court erred in holding that collateral estoppel precluded Petitioner's breach of contract claim, the Sixth Circuit properly upheld the decision. Petitioner's breach of contract claim was also barred by the doctrine of *res judicata*, and was untenable in light of the undisputed fact that Petitioner could not satisfactorily perform her job duties.

Finally, the District Court properly upheld IBM's objections to producing information concerning other employees who filed discrimination complaints. The information was not relevant to Petitioner's claims, violated the privacy rights of individuals not party to the litigation and was unduly burdensome to produce. The District Court has broad discretion in such matters, and should not be reversed unless the Petitioner can show that the District Court abused its discretion and that she was prejudiced thereby. As Petitioner made no such showing, the Sixth Circuit properly upheld the District Court's decision.

ARGUMENT

I. PETITIONER HAS FAILED TO DEMONSTRATE SUFFICIENT REASON FOR THIS COURT TO GRANT HER PETITION

Rule 10.1 of the Supreme Court Rules states that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The rule lists examples of reasons which will be considered, including:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with or of a United States court of appeals.
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case does not involve important questions of federal law, nor has Petitioner established, or even asserted, that the rulings of the District Court, affirmed by the Sixth Circuit, conflict with the decisions of the Supreme Court or other circuit courts of appeal. Moreover, Petitioner has failed to show that the Sixth Circuit departed from the usual course of judicial proceedings, or sanctioned such a departure by the District Court. Petitioner merely asserts, based on the individual facts of this case, that the District Court should have ruled differently on purely state law and procedural issues. Such an assertion is not an adequate basis for

this Court to grant certiorari. As stated in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923):

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. at 393, 43 S. Ct. at 423.

The rules of the Supreme Court urge litigants filing petitions for certiorari to focus on the exceptional need for Supreme Court review, rather than on the merits of the underlying case. Petitioner does the exact opposite and focuses only upon the unique facts of this case. Petitioner seeks review by this Court merely as a second court of appeal, and review would be improper for such a purpose. As stated by Chief Justice Taft:

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Jurisdiction of Circuit Courts of Appeals and United States Supreme Court Pay of Supreme Court Reporter, Hearings Before the House Committee on the Judiciary, 6th Cong., 2d Sess. 33 at 2 (1922) (Taft, C. J.).

Petitioner's underlying claims deal with substantive issues of an exclusively "state law" nature. She has asserted no federal claims. Moreover, the procedural issues raised by Petitioner

concern simple, straightforward matters of discovery, and the propriety of the District Court's refusal to permit an amendment to her Complaint. Such procedural issues are resolved by the lower courts on a daily basis, and do not merit the attention of this Court, especially where the Sixth Circuit found no basis for reversal.

As Petitioner has failed to establish, or even to assert, that this case involves such "special and important" issues as to justify review by this Court, the Court should deny Petitioner's Petition for Writ of Certiori.

II. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S RACE DISCRIMINATION CLAIM

Petitioner asserts that the District Court improperly granted summary judgment in IBM's favor with regard to her discrimination claim, as genuine issues of material fact exist. This Court should not be in the position of reviewing a trial court record to find disputes of fact. Petitioner is unable to establish the existence of such genuine issues here.

In order to establish a *prima facie* case of discrimination, Petitioner must prove that she was treated differently for the same or similar conduct than persons who were members of a different class. *Civil Rights Commission v. Chrysler*, 80 Mich. App. 368, 373 (1977). Petitioner cannot prove this, and said so during her deposition, stating that she does not know of other marketing representatives who were treated differently than she, nor does she have any knowledge of their performance plans or the goals which they were required to meet. Furthermore, Petitioner admitted that she *does not believe* she was treated differently because of her race within the statute of limitations period.

Petitioner argues on page 24 of her Petition that her undisputed lack of product knowledge was IBM's responsibility, in that IBM should have provided Petitioner with more or better training. There is no dispute that Petitioner received a *tremendous* amount

of training before being placed on quota in September 1986. Petitioner participated in IBM's formal training program for marketing representatives during the initial months of her employment with IBM and attended numerous education classes during the entire period of her employment. She was given six months of retraining in 1985, and an additional five months of training upon the commencement of her employment at the Detroit Renaissance Center branch office. Thereafter, she continued to take classes considered beneficial to her ability to perform her job duties. Clearly, the District Court, as affirmed by the Sixth Circuit, did not err in finding that IBM properly provided training to Petitioner.

Petitioner asserts on pages 24-25 of her Petition that Ray required her to make direct contact with customers, while the branch manager, John Kennedy, did not want her to have direct client contact. This assertion is untrue. The record establishes that Petitioner could fulfill her sales plan goals either by selling directly to customers *or* by providing assistance to marketing representatives in making sales. Moreover, Petitioner admitted during her deposition that she was *not* forbidden from contacting customers directly. Because her role as overlay representative required her to work closely with marketing representatives, Petitioner was expected to inform the appropriate marketing representative of her desire to contact his customer prior to contacting the customer.

Petitioner places much emphasis on the fact that she attained her quota in 1987 while certain other overlay software representatives did not. However, the mere fact that Petitioner met her quota in 1987 does *not* suggest that she should have been treated differently. Jeff Ray testified during his deposition that attainment of quota was only *one aspect* of Petitioner's performance plan, and that other aspects of her performance were considered in evaluating her.

On page 22 of her Petition, Petitioner lists three overlay software marketing representatives who failed to attain their quotas in 1987, yet remained employed with IBM. This evidence

fails to support Petitioner's claim, as she offers *no* evidence regarding the overall performance of the representatives she discusses. Moreover, Petitioner ignores the fact that she achieved only 46% of her quota in 1986, yet was not fired until September 1987, when she was discharged for overall unsatisfactory performance.

On page 23 of her Petition, Petitioner "ranks" overlay software marketing representatives in Michigan in terms of quota attainment, implying that, as Petitioner's attainment falls in the middle of the ranking, her performance cannot be deemed unsatisfactory. This argument does not support Petitioner's discrimination claim.

First, the argument ignores the fact that quota attainment is not the only aspect considered in evaluating a representative's performance. Petitioner has offered no evidence pertaining to these representatives' overall performance, and cannot dispute that her overall performance was unsatisfactory.

Second, Petitioner's numbers and rankings are meaningless, as they do not take into account the *quota assigned* to each representative. Quotas assigned to marketing representatives vary in accordance with the perceived potential in their sales territories. The mere fact that F. C. Tally attained more SRP points (i.e., sold more software) in 1987 than J. P. Mills does *not* mean that his performance in terms of quota was superior to that of Mills, as he may have been assigned a larger quota than Mills.

On pages 23 and 24 of her Petition, Petitioner compares her quota performance to that of software representatives in all of Area 4. Area 4 is a geographic unit consisting of Michigan, Ohio and Kentucky. All of the individuals listed by Petitioner were located in Ohio and Kentucky, except for Petitioner, Biarnes and Hoag. On May 8, 1989, the District Court denied Petitioner information concerning representatives located in Ohio and Kentucky, finding that these employees were not similarly situated to Petitioner. Petitioner did not appeal this ruling, but nevertheless

now presents evidence concerning such employees. Clearly, such evidence cannot be used in this manner.

Second, Petitioner fails to present any evidence concerning the overall job performance of the employees listed. Petitioner places *all* her emphasis on quota attainment, assuming that because she ranked in the middle of the employees listed, she was performing satisfactorily. This assumption is erroneous.

Finally, the representatives listed were placed on quota as overlay software marketing representatives at different times, and thus were at different stages in their marketing effort at the time Petitioner's listing was prepared. Moreover, Petitioner's list ranks *mid-year*, rather than year-end, quota attainment. As quotas are assigned annually, and often change during the course of the year to reflect unforeseen events, the only quota attainment figures of significance are those reflecting year-end attainment.

On page 25 of her Brief, Petitioner asserts that "[t]he sole distinguishing characteristic between Merriweather and the other overlay software representatives in Michigan in 1987 is her race." This assertion is completely unsupported by evidence, as the *only* factor which Petitioner has reviewed with regard to other overlay software representatives *except* race is quota attainment. She has not offered any evidence of the overall performances of the representatives she discusses, and so cannot show that they were similarly situated to her but treated differently. Absent proof that the other employees were similarly situated, it is not possible to raise an inference of discrimination by proof that the other employees were not similarly treated. *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987).

Petitioner asserts in her Brief that IBM's proferred reasons for discharging her were a pretext for discrimination. However, Petitioner is unable to show support for this in the record. Petitioner does not dispute that she could not forecast future sales accurately, that she was not involved in a single significant sale during her period of employment at the Renaissance Branch office, or that the marketing representatives complained about her

performance. Furthermore, Petitioner does not dispute that she could not successfully achieve the goals of her performance plans or the improvement plan.

Petitioner's claim of discrimination is specious by her own admission. During her deposition, Petitioner admitted that personal problems occurring in 1981 rendered her unable to perform her job functions as she had before. Evidence in the record establishes that those personal problems continued into 1986 and 1987. Furthermore, Petitioner testified that she *does not believe* that she has been treated differently because of her race since May 10, 1985.

The evidence is clear that Petitioner cannot establish discrimination based on race. The Sixth Circuit properly affirmed the District Court's granting of IBM's Motion for Summary Judgment and there is no reason for this Court to conduct a second review.

III. THE SIXTH CIRCUIT PROPERLY UPHELD THE DENIAL OF PETITIONER'S MOTION TO AMEND HER COMPLAINT IN *MERRIWEATHER I*

Rule 15(a) of the Federal Rules of Civil Procedure states that "leave [to amend] shall be freely given when justice so requires." It is within the discretion of the trial court to determine whether "justice so requires," and the mandate that leave to amend should be "freely given" does not mean that it should be granted automatically. *Deasy v. Hill*, 833 F.2d 38 (4th Cir. 1987), *cert. denied*, 485 U.S. 977, 99 L. Ed. 2d 483, 108 S. Ct. 1271, citing *Foman v. Davis*, 372 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

The denial of Petitioner's Motion to Amend her complaint may be reversed only if the denial was an "abuse of discretion." *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987). An abuse of discretion exists:

> when judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused

where no reasonable man would take the view adopted by the trial court. *Delno v. Market Street Ry Co.*, 124 F 2d 965 (9th Cir. 1942).

The Sixth Circuit properly upheld the District Court's refusal to permit Petitioner to amend her Complaint. In *Foman v. Davis, supra*, this Court listed several reasons sufficient to support a denial of a motion to amend a complaint, including undue delay and undue prejudice to the opposing party. The District Court found these reasons to exist in this case.

For no discernible reason, Petitioner waited until after the completion of all discovery and until the day IBM filed its Motion for Summary Judgment to file her Motion to Amend. Her proposed amendment was based on an alleged "policy and practice" of IBM that was communicated to her *prior to* her termination from IBM's employ. Thus, Petitioner *admitted* that she knew the alleged facts upon which she based her claim *prior to* the filing of her initial complaint, yet failed to bring the claim until after discovery was completed and IBM's summary judgment motion was pending. IBM would have been severely prejudiced if Petitioner's motion had been granted, as it would have had to sustain the expense and related inconvenience of a repeat round of responsive pleading, discovery and motion practice, all of which could have been undertaken as an aspect of the pretrial activities.

Motions to amend pleadings have been almost uniformly denied in circumstances such as these. See *Kennedy v. Josephthal & Co., Inc.*, 814 F.2d 798 (1st Cir. 1987); *Ansam Associates, Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442 (2nd Cir. 1985); *Bilmar Drilling, Inc. v. IFG Leasing Co.*, 795 F.2d 1194 (5th Cir. 1986); *Kleinhaus v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Robertson v. Arizona Board of Regents*, 661 F.2d 796 (9th Cir. 1981); *Anderson v. USAir*, 818 F.2d 49 (D.C. Cir. 1987); *Minor v. Northville Public Schools*, 605 F. Supp. 1185 (E.D. Mich. 1985).

Petitioner places great emphasis on *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987), but her reliance is mis-

placed. In *Janikowski*, the plaintiff filed his motion to amend his complaint after the court-scheduled discovery cutoff date and after the defendant had filed a motion for summary judgment. However, the plaintiff's motion was not filed before the *actual* close of discovery, as the discovery period had been extended beyond the court-scheduled cutoff date until after the court had decided the defendant's summary judgment motion. Thus, the discovery period had *not* ended at the time the plaintiff in *Janikowski* filed his motion to amend.

Precisely on point is *Holland v. Metropolitan Life Insurance Co.*, 869 F.2d 1490 (6th Cir. 1989) (unpublished opinion, attached as Appendix A), where leave to amend was denied. The plaintiff had filed an age discrimination claim against her former employer. Discovery ended on November 23, and the District Court set December 21 as the last day for filing motions. On December 21, the defendant filed a motion for summary judgment. On the same day, the plaintiff filed a motion to add a breach of implied employment agreement claim. The court denied plaintiff's motion, finding that her delay in filing it was undue and that granting the motion so late into the litigation would unduly prejudice the defendant. The plaintiff appealed to the Sixth Circuit, which affirmed, stating:

> . . . In *Janikowski* . . . the timing of the motion to amend differed significantly from the present case. There the parties had agreed to hold discovery in abeyance until the court disposed of the defendant's motion for summary judgment. Discovery had not been completed. The Janikowski court expressly distinguished cases in which discovery was closed prior to the motion to amend . . . Where discovery is completed, the burden imposed on the defendant by allowing an amendment is greater, since the defendant likely will have begun trial preparation based on the issues aired in the discovery process.

The facts of the instant case are virtually identical to those of *Holland*, and therefore, Petitioner's motion to amend her complaint was properly denied.

Petitioner argues that the District Court abused its discretion by basing its decision in part upon "a scheduling order that fail[ed] to provide for a motion cutoff date for nondispositive motions . . ." Petitioner mischaracterizes the District Court's decision. The District Court did not rely only on the scheduling order, but upon Petitioner's counsels' representation during the scheduling conference that no motion to amend pleadings would be brought. This representation, together with the undue delay and resulting prejudice to IBM, justified the District Court's decision. The Sixth Circuit properly found that there was no abuse of discretion and there is absolutely no reason for this Court to review that decision.

IV. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S BREACH OF CONTRACT CLAIM IN *MERRIWEATHER II*

A. The District Court Properly Held That Petitioner's Claim Was Barred By Collateral Estoppel

The doctrine of collateral estoppel provides that "when an issue of fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Local 98 v. Flamegos Detroit Corp.*, 52. Mich App. 297, 302 (1974), quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L.Ed 2d 469, 475 (1970). The doctrine applies to findings of fact that were essential to the prior judgment. *Rinaldi v. Rinaldi*, 122 Mich. App. 391 (1983).

In *Merriweather I*, Petitioner alleged that she was discharged as a result of race discrimination. The District Court held that Petitioner's race discrimination claim had no merit, as Petitioner was in fact discharged for unsatisfactory work performance. In *Merriweather II*, the District Court held that the prior court's finding that Petitioner was discharged for unsatisfactory work performance was binding on her, and thus, Petitioner was collaterally estopped from asserting that she was discharged without just cause.

Petitioner argues that collateral estoppel is inapplicable, as the *Merriweather I* court's finding of unsatisfactory work performance was not necessary to the court's disposition of her claims. This argument is unpersuasive.

In her Response to IBM's Motion for Summary Judgment in *Merriweather I*, Petitioner sought to establish a *prima facie* case of discrimination by proving the elements set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) — that Petitioner was a member of a protected class, *that she was qualified for the job from which she was discharged*, and that she was discharged while other employees not in the protected class were retained. Petitioner then reviewed elements of Petitioner's job performance in an effort to prove that Petitioner was in fact qualified for her job.

In order to determine whether Petitioner had established a *prima facie* case of race discrimination under the *McDonnell-Douglas* standard, the District Court had *no choice* but to assess her job performance. Such an assessment was necessary to the Court's finding that Petitioner had failed to establish a *prima facie* case of discrimination, as it established that she had failed to prove an essential element of her case — that she was qualified for her job.

As the *Merriweather I* court's finding of unsatisfactory work performance was essential to its determination to dismiss the case, the *Merriweather II* Court properly held that Petitioner was collaterally estopped from asserting discharge without just cause, and the Sixth Circuit properly affirmed this decision.

B. Petitioner's Claim Is Barred By The Doctrine Of *Res Judicata*

Assuming *arguendo* that the District Court erred in determining that Petitioner's breach of contract claim was barred by

the collateral estoppel doctrine, her claim still cannot be maintained, as it is barred by the doctrine of res judicata.[1]

Res judicata constitutes a bar to a subsequent action where (1) the two actions are between the same parties or their privies; (2) the former action was decided on the merits; and (3) the same matter contested in the second action was decided in the first. *Ward v. DAIIE*, 115 Mich. App. 30 (1982).

Michigan adheres to the broad rule of *res judicata*, which states that claims that were actually litigated in a prior action are barred from the second action, *as well as* those claims arising out of the same transaction which Petitioner could have brought, but did not. *Carter v. SEMTA*, 135 Mich. App. 261 (1984); *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147 (1980).

The circumstances surrounding Petitioner's filing of her breach of contract claim in *Merriweather II* satisfy the elements required for preclusion under the *res judicata* doctrine. First, the same parties were involved in both cases — Petitioner and IBM. While Ray and Kennedy were added as individual defendants in *Merriweather II*, their inclusion does not defeat application of *res judicata*, as Petitioner made no allegations against them with respect to her breach of contract claim.

Even if she had, Michigan courts have held that "it is no objection that the former action included parties not joined in the present action, or vice versa, so long as the judgment was rendered on the merits. . . ." *Local 98 v. Flamegos Detroit Corp.*, 52 Mich. App. 297, 303 (1974), quoting *Dreſus v. First National Bank of Chicago*, 424 F.2d 1171, 1175 (7th Cir. 1970). Finally, Ray and Kennedy are "privies" of IBM, and thus cannot defeat application of the doctrine of *res judicata. Lowell Staats Mining*

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[1]While the Sixth Circuit and the District Court failed to rule on the *res judicata* issue, that does not prevent this Court from refusing to grant certiorari on this ground. *Washington v. Confederated Bands & Tribes of the Yakima Indian Notion*, 99 S. Ct. 740, 439 U.S. 463, 58 L. Ed. 2d 740, *rehearing denied*, 99 S. Ct. 1290, 440 U.S. 940, 59 L. Ed. 2d 500; *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491, *reh denied*, 398 U.S. 914, 90 S. Ct. 1684, 26 L. Ed. 2d 80 (1970).

Co. v. Philadelphia Electric Co., 651 F. Supp. 1364 (D. Colo. 1987).

The federal court's dismissal of Petitioner's first action was an adjudication on the merits, as it was predicated upon Respondent's Motion for Summary Judgment. *See Kellepourey v. Burkhart*, 163 Mich. App. 251, 260 (1987), *vacated on other grounds*, 430 Mich. 888 (1988); *Adkins v. Allstate Insurance Co.*, 729 F.2d 974, 976 (4th Cir. 1984).

Finally, the instant action involves the same matter at issue as in Petitioner's first action: Petitioner's termination from IBM's employment. That Petitioner alleged race discrimination in her first action and alleges breach of contract here does not alter the fact that the same matter is in issue, as both claims arose out of the same discharge from employment, and thus, arose from the same "transaction." *See Carter v. SEMTA*, 135 Mich. App. 261 (1984); *Brownridge v. Michigan Mutual Insurance Co.*, 115 Mich. App. 745 (1982); *Vutci v. Indianapolis Life Insurance Co.*, 157 Mich. App. 429, 439 (fn. 3) (1987); *see also, Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978).

As the prerequisites necessary for application of *res judicata* exist in this case, Petitioner is precluded from asserting her breach of contract claim against IBM. This analysis of state law should not be the basis for review by this Court.

C. IBM Had Just Cause To Terminate Petitioner's Employment

Even if Petitioner's breach of contract claim was not barred by the doctrines of *res judicata* and collateral estoppel, the District Court's judgment was properly affirmed, as Petitioner cannot establish her claim.

Petitioner alleges that she had an implied employment agreement with IBM that she would not be discharged except for good cause. Petitioner further alleges that she was discharged in violation of this agreement. Yet, the undisputed facts fail to establish a violation of the alleged just-cause contract, as

Petitioner was discharged due to her inability to perform her job functions.

The District Court in *Merriweather II* found it unnecessary to rule on the issue of whether Petitioner was discharged from IBM in breach of an implied employment agreement. However, it is clear from the Court's discussion of the collateral estoppel issue that the Court believed Petitioner was discharged for just cause. The District Court stated:

> Despite plaintiff's assertion that she was qualified, the [*Merriweather I*] Court concluded that plaintiff was terminated as the result of her poor performance evaluations and her inability to perform her job. This Court found the undisputed facts indicate plaintiff was not qualified. While plaintiff completed her training program she simply was unable to apply the knowledge she received. Plaintiff does not dispute her inability to forecast potential sales, nor that she was not involved in a significant sale during her employment at the Renaissance Branch Office. Likewise, plaintiff cannot rebut the fact that other employees complained about her performance and that her performance evaluations were below par. Plaintiff reached her quota due to overall branch sales. There is no question that plaintiff was unable to contribute to the branch sales effort.

Petitioner does not dispute that she was unable to forecast sales opportunities with any degree of accuracy, that her performance evaluations were below par, and that she was unable to contribute to the branch sales effort. In fact, Petitioner acknowledged her inability to successfully perform as a marketing representative for IBM, as she testified that her personal problems in 1981 rendered her unable to perform her job functions as she had before. Petitioner's filing of her Workers' Disability Compensation claim upon her termination further demonstrates her awareness of her inability to perform her job.

Petitioner argues that the issue of whether an employee was discharged for just cause is not capable of summary judgment.

Rather, Petitioner claims that such a question can only be resolved by a jury. Yet courts have routinely held that, where there is no genuine issue of material fact, just cause is a matter of law to be determined by the court. *See Stoken v. JET Electronics & Technology, Inc.*, 174 Mich. App. 457 (1988), *app. denied*, 432 Mich. 930 (1989); *Pachla v. Saunders System, Inc.*, 899 F.2d 496 (6th Cir. 1990); *McDonald v. Union Camp Corp.*, __ F.2d __, 52 FEP Cases 317 (6th Cir. 1990) (copy attached as Appendix B).

As Petitioner was admittedly unable to perform the requirements of her job, IBM was justified in terminating her employment. Just cause for the discharge existed as a matter of state law.

V. THE SIXTH CIRCUIT PROPERLY UPHELD THE DENIAL OF PETITIONER'S MOTION TO COMPEL

During the litigation of *Merriweather I*, Petitioner served her Fourth Set of Interrogatories on IBM, seeking, *inter alia*, information regarding race discrimination complaints filed by other IBM employees at the Renaissance Center branch office. IBM objected to providing such information, and the District Court properly refused to compel IBM to do so.

A trial court is vested with broad discretion in discovery matters, and it is unusual for an appellate court to find that a trial court has abused its discretion. *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969). Even if a trial court's decision regarding discovery matters is erroneous, it will not be reversed absent the clearest showing that denial of the discovery results in actual and substantial prejudice to the complaining litigant. *Data Disc, Inc., v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977).

Petitioner seeks complaints filed pursuant to IBM's "Open Door" policy. The Open Door policy provides an avenue whereby IBM employees may take any and all concerns they may have regarding their employment to any manager senior to their direct manager or to any executive at IBM. The complaint may be resolved immediately or additional investigation may be under-

taken until the employee's concern has been appropriately addressed.

The Open Door complaints of other employees are completely irrelevant to Petitioner's claims. In order to prove a claim of discrimination, a plaintiff must prove that she was treated differently than other *similarly situated* employees. *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089, 450 U.S. 248, 67 L. Ed. 2d 207 (1981); *Shah v. General Electric Co.*, 816 F.2d 264 (6th Cir. 1987). Petitioner was the only overlay software representative at the Renaissance Center Branch Office during 1986 and 1987. Furthermore, there was no overlay software representative employed at the Renaissance Center Branch Office in 1984 and 1985. Therefore, no employee at that Branch was similarly situated to Petitioner.

Petitioner sought information concerning *all* employees at the Renaissance Branch, including clerical, managerial, sales, marketing and technical employees. These employees performed different functions, had different goals, and required different types of supervision than Petitioner. Thus, they were not similarly situated to her. The allegations of these employees and the investigations of their *individual* circumstances have no bearing on Petitioner's claim. *See Huff v. N.D. Cass Company of Alabama*, 468 F.2d 172 (5th Cir. 1972); *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982); *Weir v. Litton Bionetics*, 43 FEP Cases 663 (D. Md. 1987).

In addition to its irrelevant nature, disclosure of the information Petitioner requested would violate the privacy rights of persons not parties to this litigation. Non-party witnesses have privacy rights under the First and Fourth Amendments and under the Federal Rules of Civil Procedure upon which the courts should not readily intrude. *Clyburn v. News World Communications, Inc.*, 117 FRD 1 (D. DC. 1987). "Discovery should be limited to the core issues in a case essential to its resolution . . . and this factor weighs even more heavily where privacy interests are implicated." *Id.* at 2. *See also Farnesworth v. Proctor & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985).

The effectiveness of the Open door procedure depends on the strict confidentiality and privacy that Open Door complaints and investigations are accorded. Employees are assured that their concerns will be heard and investigated in the strictest confidence and that their privacy will be respected. Employees who are interviewed during the investigation of another employee's concern speak candidly in reliance upon the same assurance of confidentiality.

There are four criteria for identifying confidential communications which will not be subject to discovery:

1. The communication must originate in confidence;
2. The element of confidentiality must be elementary to the maintenance of the relationship;
3. The communication must be one which ought to be encouraged;
4. The injury caused by disclosure of the communication would be greater than the benefit gained.

8 Wigmore on Evidence § 2285 at 527 (McNaughton rev. 1961).

IBM's Open Door process clearly meets the requirements delineated above. First, Open Doors are submitted by employees in reliance upon assurances of complete confidentiality and privacy. Second, confidentiality is a necessary element to the effectiveness of the objective review. If employees were not assured of confidentiality they would not be candid or would not avail themselves of the process. Similarly, employees with information relevant to another employee's concerns would be resistant to speak candidly.

Third, IBM's Open Door policy should be encouraged because it helps the important process of internally airing and addressing employee concerns. Finally, the potential injury to the system from the disclosure of the confidential and private information far outweighs any benefit which could be gained. Subjecting Open Door complaints and investigations to disclosure

would cast a chilling effect over the entire process. Employees would hesitate to make submissions, and the company might not be as vigorous and candid in answering submissions.

In addition to their irrelevant and intrusive nature, Petitioner's interrogatories were objectionable because they were unduly burdensome and oppressive. Under the Open Door procedure, IBM employees can submit complaints regarding their employment to virtually any manager at IBM senior to their own direct supervisors. These complaints can concern any aspect of an employee's conditions of employment, such as appropriate pay, territory reassignments or quota adjustments. Open Door complaints can be resolved in an informal manner or a formal manner. Investigations of varying levels of complexity may be undertaken. Thus, IBM cannot keep formal records of all Open Door complaints "filed" by its employees. Furthermore, any formal records that may exist are maintained by the manager to whom the Open Doors were addressed, and not in some central depository. Therefore, providing the information Petitioner requested would require an analysis of numerous files, housed at geographically dispersed locations. Given the lack of relevance of the request, the District Court properly found that such a burden was not warranted. *See In Re U. S. Financial Securities Litigation*, 74 FRD 497 (D.C. Cal. 1975).

In light of the irrelevant, confidential and burdensome nature of the information sought by Petitioner, the Sixth Circuit properly upheld the District Court's refusal to compel production of the requested information. The trial court's discovery ruling is not sufficient to invoke a review by this Court.

CONCLUSION

Given the facts and authority cited above, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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DATED: February 6, 1991

APPENDIX A

Holland v. Metropolitan Life Insurance Company

APPENDIX A

(To be reported at: 869 F.2d 1490 (Table))
Unpublished Disposition. Text in Westlaw.

NOTICE: The Sixth Circuit provides by rule criteria for designating decisions of publication, and states that citation of unpublished decisions is "disfavored" though under prescribed conditions such decisions may be cited if counsel serves a copy on all parties and the court. Sixth Circuit Rules, Rule 24, 28 U.S.C.A.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DECISION WILL APPEAR IN TABLES PUBLISHED PERIODICALLY.

Jennieve HOLLAND, Plaintiff-Appellant,
v.
METROPOLITAN LIFE INSURANCE COMPANY,
Defendant-Appellee.
No. 88-1347.
United States Court of Appeals, Sixth Circuit.
Feb. 3, 1989.

E.D.Mich.
AFFIRMED.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before KENNEDY and DAVID A. NELSON, Circuit Judges, and JOHN W. PECK, Senior Circuit Judge.

PER CURIAM.

Plaintiff Jennieve Holland appeals from the District Court's denial of her motion to amend her complaint under Fed.R.Civ.P. 15(a). We conclude the District Court did not abuse its discretion and accordingly affirm.

Holland v. Metropolitan Life Insurance Company

Holland was an employee of defendant Metropolitan Life Insurance Company ("Metropolitan") for over nineteen years. She was terminated on May 2, 1986. The company explained that her dismissal was part of a necessary reduction in work force; plaintiff contended that it was motivated by unlawful age discrimination. On January 5, 1987, Holland brought an action against Metropolitan in state court under the Elliott-Larsen Civil Rights Act, Mich.Comp.Laws Ann. § 37.2101, et seq. Defendant removed to the United States District Court on January 26, 1987.

Discovery originally was scheduled to end on September 30, 1987. After the parties stipulated to two extensions, November 23, 1987 was agreed to as the final discovery cutoff date. By consent of the parties, two additional depositions were taken after the discovery cutoff date on December 14, 1987. The District Court set December 21, 1987, as the last date for filing motions.

On December 21, 1987, Metropolitan moved for summary judgment on plaintiff's age discrimination claim. The District Court granted the summary judgment motion; plaintiff does not appeal this ruling. On the same day, plaintiff moved to amend her complaint to include a contract claim based on Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980). The contract claim was founded on Metropolitan's alleged violation of its "Guideline" for work force reductions. Plaintiff conceded that she had been aware of the Guideline since July 1987, but she argued that the viability of her Toussaint claim had been uncertain until she obtained the depositions of company officials during discovery in the age discrimination matter. In a ruling from the bench, the District Court denied plaintiff's motion to amend. Noting that discovery had been closed since November, the court concluded that "defendant would not be afforded an opportunity to fully defend on these charges without substantial discovery. . . ." Further, the court was unpersuaded by plaintiff's explanation for her delay in asserting the contract claim. Plaintiff, the court observed, "had a year of discovery" and should have

been able to determine the viability of the contract claim prior to the last day for motions.

A district court's decision to deny amendment under Rule 15(a) may be reversed only if it constitutes an abuse of discretion. Estes v. Kentucky Utilities Co., 636 F.2d 1131, 1133 (6th Cir.1980). In tension with this broad grant of discretion is Rule 15's provision that amendments should be "freely given" when justice so requires. The Rule was intended to "reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings." Tefft v. Seward, 689 F.2d 637, 639 (6th Cir.1982). To deny the motion to amend, the district court must find "at least some significant showing of prejudice to the opponent." Moore v. City of Paducah, 790 F.2d 557, 562 (6th Cir.1986). In light of plaintiff's lengthy delay in asserting her contract claim, we conclude the District Court did not abuse its discretion in denying the motion to amend.

Plaintiff relies heavily on Janikowski v. Bendix Corporation, 823 F.2d 945 (6th Cir.1987), which held that the district court had abused its discretion in refusing to allow Janikowski to amend his age discrimination complaint to include a contract claim. The court found the burden of additional discovery placed on Bendix was not sufficient prejudice to preclude plaintiff's contract action. Id. at 951. Instead, "[t]he proper remedy for subjecting [an opponent] to duplicative discovery would be to require the amending party to bear a portion of the additional expense." Id. at 952 (citations omitted). Plaintiff argues that she is in an identical position: she seeks to amend an age discrimination complaint to include a contract count, and the only prejudice to Metropolitan would be the burden of additional discovery. In Janikowski, however, the timing of the motion to amend differed significantly from the present case. There the parties had agreed to hold discovery in abeyance until the court disposed of the defendant's motion for summary judgment. Discovery had not been completed. The Janikowski court expressly distinguished cases in which discovery was closed prior to the motion to amend:

> Although prejudice has been found in cases where the motion for leave to amend was filed after completion of discovery, [citations omitted] no such fact pattern is present here.

823 F.2d at 952.

In the present case, by contrast, the motion to amend was filed weeks after the November 23 discovery cutoff date, and months after plaintiff concedes she became aware of defendant's Guideline. Plaintiff has offered no convincing reason for her delay until December 21. Where discovery is completed, the burden imposed on the defendant by allowing an amendment is greater, since the defendant likely will have begun trial preparation based on the issues aired in the discovery process.

Plaintiff observes that this Court permitted eleventh hour amendments in Moore and Tefft. In both of those cases, however, the plaintiff sought to amend the complaint to include a cause of action which clearly would have been supported by the facts alleged in the original pleadings. See Moore, 790 F.2d at 562 ("[R]ejection of the amendment would preclude plaintiff's opportunity to be heard on the merits on facts ... which were pleaded at the outset. ..."); Tefft, 689 F.2d at 639 ("It is obvious that the facts as set forth in Tefft's original complaint would support a cause of action for a constitutional tort, ..."). In the present case, plaintiff's complaint set forth facts sufficient to support an age discrimination claim, but not a contract claim. Plaintiff admits that her "original Complaint does not include an allegation about [Metropolitan's] lay-off policy." Reply Brief at 19. Since plaintiff's complaint did not allege sufficient facts to support the cause of action asserted in the amendment, the rationale of Moore and Tefft does not apply.

The judgment of the District Court is AFFIRMED.

C.A.6 (Mich.),1989.

APPENDIX B

APPENDIX B

McDONALD v. UNION CAMP CORP.

U.S. Court of Appeals,
Sixth Circuit (Cincinnati)
52 FEP Cases 817

McDONALD v. UNION CAMP CORPORATION, No. 89-1253, March 22, 1990

STATE FEP ACTS

1. Discharge •106.134001 •106.13273

Fifty-three-year-old manufacturing manager who was discharged after refusing demotion cannot prove that he was qualified for his position, where he acknowledges that supervisors were dissatisfied with his job performance, and while he argues that employer made too big a deal out of his alleged "people problems," he simply was not performing to employer's satisfaction.

2. Discharge •106.1325 •106.13273 •106.134001 •106.4306

Fifty-three-year-old manufacturing manager who was discharged after refusing demotion cannot make out prima facie case under Michigan courts' interpretation of Michigan Elliott-Larsen Civil Rights Act, where he is required to show that person responsible for discharge was predisposed to discriminate against persons in affected class, but while he argues that certain remarks make by his direct supervisor indicate clear case of age bias, he was discharged by that supervisor's superior, supervisor's remarks are not attributable to superior, and there is no evidence that superior was predisposed to age discrimination.

3. Discharge •106.1325 •106.13273 •106.13275 •106.13278 •106.134001 •108.7209

Summary judgment appropriately was granted to employer that discharged 53-year-old manufacturing manager after he

refused demotion, even though he made out prima facie case by alleging that general manager commented about length of his time with employer, stated that his supervisory techniques were outdated, and indicated that plant's most senior salesman at age 55 should be replaced with younger one who would be cheaper to employ, where employer explained that his alleged "people problems" were well documented, that he was unwilling to change his methods, and that he refused to accept different position, and while he argues that employer made too big a deal out of those alleged problems and that its explanation was merely a cover-up for discrimination, mere conclusory allegations are insufficient to withstand motion for summary judgment, fact that he disagrees with employer's assessment of his performance does not render its reasons pretextual, and allegedly discriminatory remarks made by general manager are not attributable to ultimate decision maker.

Appeal from the U.S. District Court for the Western District of Michigan. Affirmed.

Martin R. Strum, Kalamazoo, Mich., and Angela J. Nicita, Detroit, Mich., for appellant.

Jeffrey K. Ross and John T. Murray, Chicago, Ill., and Barry R. Smith (Miller, Johnson, Snell & Cummiskey), Kalamazoo, Mich., for appellee.

Before JONES and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

Full Text of Opinion

ANTHONY J. CELEBREZZE, Senior Circuit Judge: — The plaintiff-appellant Robert McDonald brought this action against his former employer, the defendant-appellee Union Camp Corporation (hereinafter Union Camp) alleging in Count I, that his termination from Union Camp's employ was a breach of employment contract, and in Count II, that he was discriminato-

rily discharged because of his age in violation of the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. §37.2101 *et seq.* (1985 & Supp. 1988). The complaint was originally filed in the Circuit Court for the County of Kalamazoo. However, on February 24, 1987, the defendant removed the case to the United States District Court for the Western District of Michigan on the basis of diversity jurisdiction. Title 29 U.S.C. §1441. McDonald now appeals the judgment of the district court which directed a verdict for Union Camp on the breach of contract claim, and the order which granted summary judgment in favor of Union Camp on the age discrimination claim. We affirm.

I.

Union Camp's Container Division manufactures corrugated containers, commonly known as cardboard boxes, at various plants located across the United States. Union Camp hired McDonald on January 25, 1960 at the Chicago box plant as a line supervisor. Thereafter, McDonald held various staff and supervisory positions with Union Camp, and in 1969, became the manufacturing manager for the Lapeer, Michigan box plant. In 1977, McDonald became the manufacturing manager for the Kalamazoo, Michigan plant as well as the Lapeer plant. He performed in this dual capacity until December 1980, when the Lapeer plant closed. McDonald remained as the manufacturing manager of the Kalamazoo plant until his employment was terminated in June 1986. As the plant manufacturing manager, McDonald had overall responsibility for the plant's actual manufacturing operations. The manufacturing supervisors reported to him, and he reported to the plant general manager, who had responsibility for the entire plant operation.

Union Camp reviewed the performance of its employees on an annual basis. The review was performed by the employee's immediate supervisor (in McDonald's case, the general manager). The evaluation was never shown to the employee, but was

discussed with the employee to the extent the reviewer chose to do so. In addition, raises were based upon job performance; the better an employee's evaluation, the higher the raise would be. There was also a bonus system in effect for supervisory personnel called the Management Incentive System Bonus Plan. The employee was given bonus points at the end of the year based upon the extent to which he achieved the goals set; the more points received, the higher the bonus.

It is undisputed that throughout many years at Union Camp, McDonald received excellent performance assessments and received various raises and bonuses recognizing his performance. However, personnel records show that McDonald had been critized over the years for his inability to communicate and get along with his superiors and subordinates. In fact, on several occasions, intermediate management officials recommended to the regional manager that McDonald be transferred or terminated. However, despite these recommendations, McDonald remained at the Kalamazoo plant since production and performance figures were good.

In 1985, Chris Bakaitis took over the position of General Manager of the Kalamazoo plant. At that time, personnel records showed that production was declining and that McDonald continued to have communication difficulties. In August 1985, Regional Manager Sutlive and General Manager Bakaitis placed McDonald on a sixty-day probation which called for "immediate and sustained improvement." McDonald objected to these evaluations and claimed that he was being subjected to age discrimination by his plant manager, Bakaitis.

Later, in March 1986, the new Regional Manager, Carl Raglin, General Manager Bakaitis, and another executive met with McDonald to again discuss his performance. During this meeting, McDonald refused to acknowledge any unsatisfactory conduct on his part and claim that his alleged communication difficulties were immaterial since his plant's production perform-

ance was excellent, and that any recent decline in production should not be held against him since production was down in all plants. Thereafter, McDonald was removed from the manufacturing manager's position and offered two other positions within the company, one as a Superintendent of Maintenance and Engineering, and one as a Second Shift Finishing Supervisor. Although Union Camp offered to continue McDonald at his former salary, both positions were considered demotions. McDonald refused both offers, and his termination became effective on July 11, 1986.[1]

As a result, McDonald filed his complaint bringing claims of age discrimination and breach of employment contract. On January 4, 1989, the district court granted Union Camp's Motion for Summary Judgment with respect to McDonald's age discrimination claim. The court held that there was no material factual dispute with respect to McDonald's prima facie case of unlawful age discrimination since McDonald admitted that his superiors were dissatisfied with his job performance. The court further opined that even if McDonald had established a prima facie case of age discrimination, Union Camp had articulated legitimate business reasons for its decision, and McDonald had failed to present evidence raising a genuine issue of material fact as to whether Union Camp's reasons were pretextual.

At trial on the breach of employment contract claim, the district court utilized the provisions of Michigan implied contract law and found that based on representations made to McDonald, a reasonable juror could find that Union Camp had made a contract with McDonald under which McDonald could be discharged from Union Camp only for just cause. The court further

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[1] McDonald's former position remained vacant until January 1988 when Union Camp hired John Pokerino, age 53, to fill that position. During the interim, McDonald's duties were split among Bakaitis, age 36; Knapp, age 33; and Corbin, age 53. It is also significant to note that Pokerino, at age 53, was hired well after the commencement of this age discrimination suit.

found, however, that there was no evidence from which a reasonable juror could find that McDonald was promised continued tenure in any particular position. Consequently, the court reasoned that since Union Camp offered McDonald two other positions which McDonald rejected, no reasonable juror could find that the agreement was breached. Therefore, the court directed a verdict in favor of Union Camp. This timely appeal ensued.

II.

According to the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. §37.2202(1)(a), an employer shall not discharge an employee because of age. This provision is similar to the federal Age Discrimination in Employment Act (ADEA) in that the same evidentiary burdens prevail. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937 [44 FEP Cases 418] (6th Cir. 1987); *Gallaway v. Chrysler Corp.*, 105 Mich. App. 1, 306 N.W.2d 368, 370-71 [33 FEP Cases 500] (1981) (adopting Sixth Circuit analysis in *Laugesen v. Anaconda Co.*, 510 F.2d 307 [10 FEP Cases 567] (6th Cir. 1975)). A Michigan plaintiff who alleges unlawful employment discrimination generally has three approaches at his disposal. First, he may proceed under the approach enunicated by the United States Supreme Court in the landmark case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [5 FEP Cases 965] (1973). The second approach is one delineated by the Michigan courts which generally examines whether age was a determinative factor in the plaintiff's discharge. Finally, a plaintiff may proceed by showing through circumstantial, statistical or direct evidence that he has been discriminated against.

A. *McDonnell Douglas* Approach

The traditional approach for proceeding under an employment discrimination claim was established in *McDonnell Douglas*

Corp. v. Green, 441 U.S. 792 [5 FEP Cases 965] (1973), and has been routinely employed in this circuit. *See, e.g., Simpson v. Midland-Ross Corp.,* 823 F.2d 937 [44 FEP Cases 418] (6th Cir. 1987); *Wilkens v. Eaton Corp.,* 790 F.2d 515 [40 FEP Cases 1349] (6th Cir.), *reh'g denied,* 797 F.2d 342 [45 FEP Cases 525] (1986); *Laugesen v. Anaconda Co.,* 510 F.2d 307 [10 FEP Cases 567] (6th Cir. 1975). A plaintiff making such a claim carries the initial burden of proving by a preponderance of the evidence a prima facie case of age discrimination. *See McDonnell Douglas,* 411 U.S. at 802. This requires a showing that:

> (1) he was a member of a protected class (age 40 to 70);
>
> (2) he was subjected to adverse employment action;
>
> (3) he was qualified for the position; [and]
>
> (4) he was replaced by a younger person.

Simpson, 823 F.2d at 940 (application of *McDonnell Douglas* to the age discrimination context). Proof of all four criteria raises a presumption of age discrimination. *Id.* If the plaintiff succeeds in proving the prima facie case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's [discharge]." *McDonnell Douglas,* 411 U.S. at 802. Finally, should the employer carry this burden, the plaintiff then must prove by a preponderance of the evidence "that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 [25 FEP Cases 113] (1981). This essentially amounts to a showing that the "presumptively valid reasons for his [discharge] were in fact a cover-up for a racially discriminatory decision." *McDonnell Douglas,* 411 U.S. at 805.

[1] Application of this standard to the instant case reveals that McDonald is unable to prove a prima facie case of age

discrimination. There is no question that McDonald, age 53, is a member of the protected class; and indeed, he was terminated. Thus, the first two prongs are satisfied. However, McDonald is unable to prove the third prong of the *McDonnell Douglas* test, that he was qualified for the position.

In order to show that he was qualified, McDonald must prove that he was performing his job "at a level which met his employer's legitimate expectations." *Huhn v. Koehring,* 718 F.2d 239, 243 [32 FEP Cases 1684] (7th Cir. 1983). Moreover, "[i]f [McDonald] was not doing what his employer wanted him to do, he was not doing his job. . . . [McDonald] does not raise a material issue of fact on the question of the quality of his work merely by challenging the judgment of his supervisors." *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 [23 FEP Cases 1412] (7th Cir. 1980), *cert. denied,* 450 U.S. 959 [24 FEP Cases 1827] (1981). In this case, McDonald does not dispute, but in fact acknowledges that his supervisors were dissatisfied with his job performance in the summer of 1986 when he was discharged. Instead McDonald argues that Union Camp made too big a deal out of his alleged "people problems." However, the aim is not to review bad business decisions, or question the soundness of an employer's judgment. *See Wilkens v. Eaton Corp.,* 790 F.2d 515, 521 [40 FEP Cases 1349] (6th Cir. 1986). McDonald was simply not performing to Union Camp's satisfaction. Since McDonald concedes this point, there remains no genuine issue of material fact as to whether he was qualified. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Consequently, McDonald has failed to prove a prima facie case of age discrimination, and therefore, summary judgment under the *McDonnell Douglas* approach is appropriate.

B. Michigan Law Approach

According to the Michigan Supreme Court in *Matras v. Amoco Co.,* 424 Mich. 675, 385 N.W.2d 586 [43 FEP Cases 931] (1986), a plaintiff may establish a prima facie case of age

discrimination under the Elliott-Larsen Civil Rights Act by demonstrating that age was a determinative factor in the employer's adverse employment action. Where the plaintiff proceeds on a theory of intentional discrimination, as in the case at bar,[2] the elements by which he may demonstrate that age was a determinative factor in discharging him are: (1) that he is a member of the affected class; (2) that some adverse employment action was taken against him; (3) that the person responsible for this adverse action was predisposed to discriminate against persons in the affected class; and (4) that the person responsible for this adverse action had actually acted on this predisposition with respect to the plaintiff. *See Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 378 N.W.2d 558 [47 FEP Cases 1276] (1985); *Jenkins v. Southeastern Michigan Chapter American Red Cross*, 141 Mich.App. 785, 369 N.W.2d 223 [43 FEP Cases 1145] (1985); *Schipani v. Ford Motor Co.*, 102 Mich.App. 606, 302 N.W.2d 307 [30 FEP Cases 361] (1981); *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 80 Mich.App. 368, 263 N.W.2d 376 [22 FEP Cases 1160] (1977).

[2] Under this approach, McDonald satisfies the first two elements: that he was a member of the affected class and he was terminated. However, McDonald again fails to satisfy the third prong, that the person responsible for his discharge was predisposed to discriminate against persons in the affected class. McDonald argues that certain remarks made by his direct supervisor, Chris Bakaitis, indicate a clear case of age bias.[3] Assuming

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[2] In considering McDonald's claim with respect to Michigan law, the district court incorrectly applied the "disparate treatment" standard. McDonald does not allege that he was treated differently than those similarly situated, but rather that he was intentionally discriminated against.

[3] McDonald testified that Bakaitis once remarked that a senior salesman at age 55 "could be cheaply replaced with a younger salesman." McDonald further testified that on several other occasions. Bakaitis made comments involving age bias that were directed at McDonald.

arguendo that Bakaitis was, in fact, predisposed to age discrimination, McDonald's argument is, nevertheless, without merit. McDonald was fired by Bakaitis' supervisor, Carl Raglin, and Bakaitis' discriminatory remarks are not attributable to Raglin. This circuit has held that a statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official. *Stendebach v. CPC Internat'l Inc.*, 691 F.2d 735 [30 FEP Cases 233] (6th Cir. 1982), *cert. denied*, 461 U.S. 944 [31 FEP Cases 1296] (1983); *see also La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405 [36 FEP Cases 913] (7th Cir. 1984). Moreover, there is no evidence, nor has McDonald made such an allegation, that Raglin was predisposed to age discrimination.[4]

Consequently, there remains no genuine issue of material fact with respect to the third and fourth prongs. Thus, McDonald has failed to prove a prima facie case of age discrimination under the standard adopted by the Michigan courts, and therefore, summary judgment is appropriate.

C. Direct, Statistical or Circumstantial Evidence Approach

Although the *McDonnell Douglas* standard has proven to be an effective means of resolving employment discrimination suits, not all cases are susceptible to its use. This court has repeatedly held that age discrimination suits should be decided on a case by case basis, and that rigid adherence to *McDonnell Douglas* should be discouraged. *Wanger v. G.A. Gray Co.*, 872 F.2d 142 [49 FEP Cases 800] (6th Cir. 1989); *Merkel v. Scovill*, 787 F.2d 174 [40

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[4] In fact, on several occasions, when intermediate management officials recommended to Raglin that McDonald be discharged, Raglin disregarded these recommendations and kept McDonald on. However, in 1986, after observing McDonald more closely, Raglin described McDonald as "stubborn, obstinate, and unwilling to adapt to changing management philosophies, or even simply to do what I told him to do." Raglin affidavit at 2. This is what led to McDonald's termination.

FEP Cases 1383] (6th Cir.), *cert. denied*, 479 U.S. 990 [42 FEP Cases 560] (1986); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (27 FEP Cases 1563] (6th Cir. 1982); *Sahadi v. Reynolds Chem.*, 636 F.2d 1116 [23 FEP Cases 1338] (6th Cir. 1980) (per curiam). "Instead of a mechanistic application of the *McDonnell Douglas* guidelines, a trial judge is to consider 'direct evidence of discrimination, and circumstantial evidence other than that which is used in the *McDonnell Douglas* criteria.' " *Wanger*, 872 F.2d at 145 (*quoting Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 [30 FEP Cases 1177] (6th Cir. 1983)). A plaintiff may present a prima facie case of age discrimination "by introducing evidence that he was adversely affected by the defendant's employment decisions 'under circumstances which give rise to an inference of unlawful discrimination.' " *Ridenour v. Lawson Co.*, 791 F.2d 52, 55 [40 FEP Cases 1455] (6th Cir. 1986) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 [25 FEP Cases 113] (1981)).

Moreover, whether analyzed in terms of Michigan's Elliott-Larsen Act or federal law, the same evidentiary burdens prevail. *Simpson*, 823 F.2d at 940. Consequently, once the plaintiff proves a prima facie case of discrimination, the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's [discharge]." *McDonnell Douglas*, 411 U.S. at 802. If the employer is successful, the presumption raised by the prima facie case is rebutted, thereby placing the ultimate burden of persuasion upon the plaintiff. *See Ridenour*, 791 F.2d at 56. The plaintiff must then "demonstrate that the [employer's] proffered reasons for its actions were pretextual." *Id.*

[3] To prove a prima facie case of age discrimination, McDonald must present evidence indicating that age was a factor in Union Camp's decision to terminate him, McDonald's allegations focus primarily on comments made by General Manager

Bakaitis, which were allegedly directed at McDonald. McDonald alleged that Bakaitis often commented to McDonald about the length of time he had been with the company and stated that his supervisory techniques were outdated. McDonald also claimed that during an office meeting, Bakaitis indicated that Bill Chapman, who was the plant's most senior salesman at age 55, should be replaced with a younger salesman who would be cheaper to employ. McDonald alleged that these types of remarks were not isolated incidents and were made by Bakaitis on several other occasions. Consequently, when viewed in a light most favorable to McDonald, we find that the pleadings and depositions raise an inference of discrimination sufficient to satisfy a prima facie case.

However, Union Camp has produced a legitimate, nondiscriminatory reason for its decision. McDonald's alleged "people problems" were well documented and dated back as far as 1970. Since McDonald was unwilling to change his methods to conform with Union Camp's wishes and refused to accept a different position, albeit a new position which essentially amounted to a demotion, Union Camp was left with no other alternative but to discharge McDonald.

With respect to pretext, McDonald argues that Union Camp made too big a deal out of his alleged "people problems," and that such was merely a cover-up for unlawful age discrimination. However, mere conclusory allegations are not sufficient to withstand a motion for summary judgment. *See Patterson v. General Motors Corp.*, 631 F.2d 476, 482 [23 FEP Cases 894] (7th Cir. 1980), *cert. denied*, 451 U.S. 914 [27 FEP Cases 221] (1981). Furthermore, the fact that McDonald disagrees with Union Camp's assessment of his performance as manufacturing manager does not render Union Camp's reasons pretextual. As previously stated, McDonald does not raise a factual dispute by alleging that Union Camp made a poor business decision. *Kephart*, 630 F.2d at 1223; *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559-61 [44 FEP Cases 1137] (7th Cir.) ("A reason honestly described but

poorly founded is not a pretext as that term is used in the law of discrimination."), *cert. denied,* 484 U.S. 977 [45 FEP Cases 648] (1987); *Gray v. New England Telephone & Telegraph Co.,* 792 F.2d 251, 255 [40 FEP Cases 1597] (1st Cir. 1986) (not enough to show employer made an unwise business decision). Finally, the allegedly discriminatory remarks made by Bakaitis are not attributable to Raglin, who was the ultimate decision maker. *See La Montagne,* 750 F.2d at 1412. Consequently, McDonald fails to raise a genuine issue of material fact that Union Camp's reason to discharge him was pretextual, and therefore, summary judgment is appropriate.

Thus, whether analyzed according to the dictates of *McDonnell Douglas,* the standard delineated by the Michigan courts, or the direct, statistical or circumstantial evidence approach, McDonald fails to raise a factual dispute sufficient to withstand summary judgment.

III.

In his second count, McDonald alleged that his discharge was a breach of his employment contract. Specifically, McDonald alleged that, although he had no written employment contract, his employer's actions and representations created an implied contract not to be terminated except for just cause. In granting Union Camp's motion for directed verdict, the district court made two findings: (1) that certain representations made to McDonald, such as his "future being secure," provided sufficient evidence to create a jury question of whether an employment contract existed; and (2) that no reasonable juror could find a breach of that contract because there had been no promise to retain McDonald in the position of manufacturing manager. The court reasoned that since Union Camp had offered McDonald another position with the company with no reduction in salary, which he had refused to accept, there had been no breach of contract as a matter of law and that Union Camp had just cause to terminate

him. In addition, the court permitted McDonald to amend his complaint pursuant to Fed. R. Civ. P. 15(b) to allege that he was constructively discharged when offered the demotions; the court, however, stated that this did not change its ruling and directed a verdict for Union Camp.

In actions where jurisdiction is based upon diversity of citizenship, federal courts are required to apply state law when determining whether there is sufficient evidence to present a case to a jury for resolution. *Gold v. National Savings Bank of the City of Albany,* 641 F.2d 430 (6th Cir. 1980), *cert. denied,* 454 U.S. 826 (1981). Consequently, Michigan law must be applied in determining whether the trial court in the case at bar properly directed a verdict for Union Camp.

According to Michigan law, a trial court must conclude that reasonable persons could reach but one conclusion before directing a verdict. *Marietta v. Cliffs Ridge, Inc.,* 385 Mich. 364, 189 N.W.2d 208 (1971); *Gootee v. Colt Industries, Inc.,* 712 F.2d 1057 (6th Cir. 1983). Furthermore, the court must view all evidence in the light most favorable to the non-moving party, "without weighing the credibility of witnesses or considering the weight of the evidence. . . ." *Gootee,* 712 F.2d at 1062. The same standard is applicable on appeal. *See Milstead v. Internat'l Brotherhood of Teamsters,* 580 F.2d 232 [99 LRRM 2150] (6th Cir. 1978). Applying this standard to the instant case, this court is compelled to affirm the judgment below.

It is generally recognized by Michigan courts and federal courts applying Michigan law, that employers' handbooks, policy statements and oral representations can create binding contractual obligations limiting the employers' right to discharge an employee at will. *Toussaint v. Blue Cross & Blue Shield of Mich.,* 408 Mich. 579, 292 N.W.2d 880 [115 LRRM 4708] (1980). Such a provision may be created as a result of an employee's legitimate expectations based upon the employer's conduct and practices. *Id.* at 885. However, an employee's mere subjective

expectation that he will not be discharged except for just cause "is insufficient to establish a contract implied in fact." *Schwartz v. Michigan Sugar Co.*, 106 Mich.App. 471, 308 N.W.2d 459, 462 [115 LRRM 4535] (1981). Ultimately, based upon an examination of the evidence, whether it be a personnel manual or oral statements relating to job security, the existence of a legitimate expectation of continued employment is a question for the trier of fact. *See Bullock v. Auto. Club of Mich.*, 146 Mich.App. 711, 381 N.W.2d 793 (1985).

McDonald produced the following evidence at trial: (1) statements made by upper-level management that he could expect job security as long as he did his job; (2) statements that if he did a good job, he could expect promotional opportunities; and (3) evidence of awards, salary increases and bonuses based on favorable evaluations. Clearly, this evidence creates an inference that McDonald had a contract implied in fact with Union Camp under which he could be discharged only for just cause.

The next inquiry concerns the terms of the contract. The district court found that the evidence could not support a finding that McDonald was promised the manufacturing manager's position, only that he was promised a position. McDonald, however, claims that there was sufficient evidence to infer that he was promised continued employment as a manufacturing manager, and consequently, when he was offered the demotions, he was effectively discharged.[5]

The question as to the terms of an implied contract is generally one for the trier of fact. *See Toussaint,* 408 Mich. at 613; *Farrell,* 155 Mich.App. at 386; *Bullock,* 146 Mich App. at 719-20. In *Richards v. Detroit Free Press,* 173 Mich.App. 256, 433 N.W.2d 320 (1988), the court held that it was a question of fact for the jury whether the statements made to an employee

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[5] Since we ascribe to McDonald's contention in this respect, we need not address the issue of constructive discharge.

created a right to a particular job. *Id.* at 322. The *Richards* court further opined that "[a] demotion from one job to a lesser job is a discharge from the first job, and a demotion will support a wrongful discharge claim." *Id.* In the instant case, a reasonable juror could find that by promoting McDonald to manufacturing manager, he would not be demoted by Union Camp without just cause. Thus, unlike the district court, we find that a jury question exists as to whether the promises made to McDonald relating to job security applied to his job as manufacturing manager, or merely to his general employment with Union Camp. Despite this finding, however, if McDonald was terminated for just cause, it is immaterial which position he was entitled to.

The final issue is whether the contract was breached. Specifically, it must be determined whether McDonald's discharge was for just cause. Although this question is generally one of fact, *Toussaint*, 408 Mich. at 620-21, we hold that McDonald failed to present sufficient evidence to submit this issue to the jury and accordingly a directed verdict was properly granted. The evidence is uncontradicted — McDonald was simply not living up to Union Camp's legitimate business expectations. McDonald clearly had problems motivating his subordinates and delegating authority; these problems were documented as far back as 1970. Furthermore, on at least two occasions, it was recommended that McDonald be discharged due to his inability or unwillingness to correct these problems. McDonald was not discharged, however, since he had been compiling favorable production numbers. However, during the year 1985, after McDonald was told that he would not be promoted to the Plant General Manager job, these manufacturing performance numbers for which McDonald was ultimately responsible began to trend in the wrong direction.[6]

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[6] Corrugator tons per scheduled hour went down unfavorably, while the other three key indicators, man hours per ton, input ratio, and waste percentage all showed unfavorable increases. In addition, the plant received negative evaluations in April and May of 1986 in the regular housekeeping and safety inspections.

Consequently, Union Camp could no longer afford to overlook McDonald's deficiencies.

Examination of the record reveals that McDonald's presentation of proof contained no evidence of a wrongful discharge. McDonald acknowledged his personnel deficiencies but claimed that his dismissal was unwarranted. This is hardly a basis from which a jury could find in his favor, and we therefore decline to extend the *Toussaint* protections this far. Furthermore, McDonald, in his brief on appeal, impermissibly attempts to interject claims of age discrimination as a basis for a breach of contract claim. We have already ruled that McDonald was not discharged because of his age, *see supra*, and therefore, it is improper to reargue the point at this stage. *See Johns-Manville Corp. v. Guardian Industries Corp.*, 116 F.R.D. 97 (E.D. Mich. 1987) (issues decided at an earlier stage of litigation constitute the law of the case).

The wisdom of Union Camp's business decision is not at issue, rather the sole inquiry is whether Union Camp had just cause to terminate McDonald. In light of the overwhelming evidence of McDonald's deficient job performance and McDonald's failure to present any credible evidence that his discharge was for any reason other than his "people problems," we hold that no reasonable jury could find that McDonald's discharge was not for just cause,[7] and therefore, the directed verdict was proper.

For the foregoing reasons, the order granting summary judgment in favor of Union Camp on the age discrimination count,

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[7] Moreover, even if the jury found that McDonald was not entitled to his job as manufacturing manager, but only to a job within the company, his eventual termination was for just cause since he rejected the other offers made to him after his demotion. The record shows that Union Camp spent a great deal of time and money trying to relocate McDonald to a suitable position within the company. Since McDonald rejected the offers that Union Camp thought he could handle, termination was the only alternative.

and the judgment directing a verdict in favor of Union Camp on the breach of employment contract count are affirmed.